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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MARIO ENRIQUEZ-NEVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court correctly declined to hold a hearing in response to petitioner's claim that the stop of his truck was pretextual.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is not reported, but the judgment is noted at 931 F.2d 890 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1991. The petition for a writ of certiorari was filed on July 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of

importing marijuana, in violation of 21 U.S.C. 952(a); conspiring to commit that offense, in violation of 21 U.S.C. 963; and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 27 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A13.

1. On January 30, 1990, petitioner arrived at the residence of Richard Montoya, a known narcotics trafficker in Albuquerque, New Mexico. Two Albuquerque detectives, who were maintaining surveillance, saw petitioner engage in what they believed was a narcotics transaction with an occupant of Montoya's residence. Pet. App. A2; Gov't C.A. Br. 3. Accordingly, the detectives followed petitioner when he left. Petitioner, driving a blue van, went to a bar where he picked up co-defendant Rigoberto Castillo. The detectives followed the van for about half a mile before briefly losing sight of it. When they spotted the van again, petitioner was driving and Castillo was following in a pickup truck with Idaho license plates. Both the van and the truck drove to petitioner's house, where petitioner retrieved a New Mexico license plate. Petitioner and Castillo then left in the pickup truck and eventually headed onto a highway going south from Albuquerque. The detectives thought they were going to a "stash" house some 30 miles away, but the two men passed the location and continued driving south. Pet. App. A2.

After the detectives had followed petitioner for 60 to 70 miles, they asked a New Mexico state trooper to stop the pickup

truck because it had a broken tail light. The trooper did so. When petitioner was unable to produce a driver's license, the trooper issued a citation for that infraction. The detectives then joined the trooper and obtained petitioner's permission to search the truck; the search turned up the New Mexico license plate but no narcotics. When the detectives asked petitioner if there were any narcotics in the truck, petitioner responded that people do not transport narcotics south but rather bring them back north from Mexico. Petitioner explained that the purpose of his trip was to go to Juarez, Mexico, to have the bumper on his truck fixed and to buy some soft drinks.[1] Pet. App. A3.

The next day petitioner drove the truck to the border crossing from Juarez into El Paso, Texas. At the primary inspection station, petitioner refused to make eye contact with the Customs agent, and his voice broke when he told the agent that he had been to Juarez to visit relatives and to buy soft drinks. The agent directed petitioner to the secondary inspection station. Pet. App. A3. Castillo was immediately behind petitioner, driving a white pickup truck that bore the license plate discovered in the stop the previous day. When the Customs agent questioned Castillo about his citizenship, Castillo's hand shook with nervousness as he handed his identification to the inspector. In addition, his voice broke and he stuttered in response to questions. In looking under the hood of the white truck, the agent noticed that the gas tank had been tampered with. A search

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[1] Albuquerque is 320 miles from Juarez. Pet. App. A3.

of that tank yielded 54 1/2 pounds of marijuana. Gov't C.A. Br. 6-7; Pet. App. A3-A4.

2. After jury selection, petitioner moved to suppress the fruits of the stop of his truck by the New Mexico officers, arguing that the stop was pretextual. The district court denied the motion without a hearing, finding both that it was untimely and that the pretext claim was barred by the Fifth Circuit's decision in United States v. Causey, 834 F.2d 1179 (1987) (en banc). Pet. App. A5, A7 & n.2; 6/21/90 Tr. 28-30.

3. On appeal, petitioner argued that the district court had erred in failing to conduct a hearing on whether the stop of his truck was pretextual. The court of appeals rejected that claim, noting that in Causey, the court had held that "so long as police conduct is objectively authorized and legally permitted, the motives of the officers are irrelevant and not subject to inquiry." Pet. App. A7. Petitioner claimed that the district court had erroneously assumed that the stop in this case was "objectively legal." Ibid. The court of appeals, however, observed that petitioner had never challenged the fact that the truck had a broken tail light or that New Mexico police could make a traffic stop for that violation. In light of petitioner's failure to establish a genuine issue regarding the legality of the stop, the court held that the failure to hold a hearing on petitioner's claim was not erroneous.[2] Ibid.

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[2] The court did not reach the issue whether petitioner's suppression motion was untimely. Pet. App. A7 n.2. It noted, however, that despite petitioner's claim that his eleventh-hour motion was warranted by the government's production of the notes of the Albuquerque detectives on the afternoon before trial, petitioner clearly knew of the stop well before the trial, and the government had indicated two months previously that it intended to present evidence about the stop. Ibid. The court also noted that the district court had found that petitioner could have filed a timely motion if he had conducted an investigation. Ibid.

ARGUMENT

Petitioner contends (Pet. 7-18) that the stop of his truck for a traffic violation in New Mexico was a pretext to search the vehicle, and that the license plate found in the truck and his statements made during the stop should have been suppressed. The court of appeals correctly rejected petitioner's contention, and the issue presented in this case does not raise a conflict calling for this Court's review.

1. Petitioner contends that an arrest that is objectively supported by probable cause may be invalidated as pretextual. That contention is inconsistent with the settled rule that the validity of searches and seizures under the Fourth Amendment must be determined under "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." Scott v. United States, 436 U.S. 128 (1978). In Scott, the Court upheld the admissibility of wiretap evidence under 18 U.S.C. 2515 notwithstanding the officers' purposeful failure to comply with a minimization requirement. Relying on its decisions interpreting the Fourth Amendment, the Court explained that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate

the action taken as long as the circumstances, viewed objectively, justify that action." 436 U.S. at 138.

Subsequent cases reflect the same principle. In United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983), the Coast Guard stopped a vessel to check its documentation pursuant to a statute authorizing such inspections. Relying on Scott, the Court rejected the argument that the inspection was invalid because the Coast Guard's real reason for conducting the inspection was to pursue "an informant's tip that [the] vessel * * * was thought to be carrying marijuana." In Maryland v. Macon, 472 U.S. 463, 470-471 (1985), undercover officers paid for obscene materials with marked money that they intended to retrieve for use as evidence. The Court rejected the claim that the transaction, which constituted a purchase when viewed objectively, was actually a warrantless seizure because of the officers' intent. And in Horton v. California, 110 S. Ct. 2301 (1990), the Court rejected the "inadvertence" rule, under which police officers could not seize evidence found in plain view during a warrant-authorized search, where the officers had suspected that they might find the evidence but had failed to seek a warrant to search for it. The Court stated that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Id. at 2308-2309. These cases, as petitioner concedes (Pet. 9), "preclude[] judicial scrutiny of the motives of the arresting or

searching officer" and support the refusal of the court of appeals in this case to sanction an inquiry into the allegedly ulterior motives of New Mexico law enforcement officials.

Contrary to petitioner's contention (Pet 8-9), United States v. Lefkowitz, 285 U.S. 452 (1932), is not inconsistent with the line of cases discussed above. Petitioner relies on the statement in Lefkowitz that "[a]n arrest may not be used as a pretext to search for evidence." Id. at 467. Taken in context, however, that statement does not authorize courts to invalidate arrests on pretext grounds. The "only question presented" in Lefkowitz was whether it was reasonable for police to conduct a general search of the rooms of a house incident to an arrest made in the house. Id. at 463. The Court's analysis considered only that issue, see id. at 463-467, and did not address the separate question whether the arrest itself could be challenged despite the existence of objective facts to justify it. Fairly read, the statement in Lefkowitz that an arrest cannot be used as a "pretext" for a search means only that an arrest warrant cannot justify a relatively unlimited search of the premises in which an arrest might take place. Cf. Chimel v. California, 395 U.S. 752 (1969) (holding that a search of premises incident to an arrest is restricted to the arrestee's immediate area). As Professor LaFave has observed, Lefkowitz "turns out upon close inspection to be of no help in answering th[e] question" of the validity of allegedly pretextual arrests. 1 W. LaFave, Search and Seizure § 1.4(e), at 91 (2d ed. 1987).

2. Petitioner contends (Pet. 13-16) that there is a conflict in federal and state cases in the treatment of pretext arrests that requires this Court's attention. The conflict, however, is considerably narrower than petitioner portrays it and does not warrant review in this case.

A majority of recent court of appeals decisions that have addressed the issue have held that objectively valid police actions cannot be challenged on the theory that they were pretextual. See, e.g., United States v. Trigg, 925 F.2d 1064 (7th Cir. 1991), petition for cert. pending, No. 91-5013; United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990), petition for cert. pending, No. 90-1628; United States v. Causey, 834 F.2d 1179 (5th Cir. 1987) (en banc); cf. United States v. Nersesian, 824 F.2d 1294, 1315-1317 (2d Cir.), cert. denied, 484 U.S. 957 (1987); United States v. Hawkins, 811 F.2d 210, 213-215 (3d Cir.), cert. denied, 484 U.S. 833 (1987). Contrary to petitioner's suggestion (Pet. 13), no circuit is committed to the view that an objectively valid arrest can be challenged because of the officer's subjective motives.[3]

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[3] Petitioner errs in asserting (Pet. 13) that the Ninth, Fourth, Eighth, and D.C. Circuits have applied a subjective test. The language in United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986), that seems to endorse a subjective approach is dictum, and relied on cases before the decision in Scott v. United States. To our knowledge no recent Ninth Circuit decision has invalidated an arrest on pretext grounds. See, e.g., United States v. Lillard, 929 F.2d 500, 502 (9th Cir. 1991) (rejecting pretext claim). The Fourth Circuit rejected a pretext claim in United States v. Corbitt, 675 F.2d 626, 628-629 (1982), solely by referring to the objective facts that validated a stop and then an arrest of the defendant. The Eighth Circuit rejected the concept of a pretext arrest in United States v. Cummins, supra. The D.C. Circuit in United States v. Whitfield, 629 F.2d 136, 139 n.5 (D.C. Cir. 1980), stated in dicta that a search undertaken for investigatory purposes could not be later justified as an inventory search, but the court never alluded to, let alone accepted, the theory that an arrest supported by probable cause could be challenged on the ground that the officer had a hidden investigatory motive.

One circuit, however, has held that "the pretextual use of police power may violate the Fourth Amendment," even where the police have observed a traffic offense that would otherwise justify a stop. In United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988), the court agreed that courts should not inquire into "the officer's subjective intent," but it concluded that "an objective analysis of the facts and circumstances of a pretextual stop is appropriate," id. at 1515, to consider "not whether the officer could validly have made the stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." Id. at 1517.[4]

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[4] Petitioner errs in citing (Pet. 14) cases from the Eleventh and Sixth Circuits for the same proposition. In United States v. Smith, 799 F.2d 704, 708-709 (1986), the Eleventh Circuit held that a traffic stop based on reasonable suspicion could be challenged as pretextual if a reasonable officer would not have made the challenged stop absent suspicions of other illegal activity. But the court explicitly declined to address the question, which is presented in this case, of "when, if ever, a stop for probable cause resulting from an observed traffic violation might be invalid as pretextual." 799 F.2d at 709 (emphasis added). Subsequent Eleventh Circuit cases have continued to leave that issue open. See United States v. Dunkley, 911 F.2d 522, 525 (1990), cert. denied, 111 S. Ct. 765 (1991); United States v. Strickland, 937 F.2d 937, 940 (1990). The Sixth Circuit in United States v. Pino, 855 F.2d 357, 361 (1988), cert. denied, 110 S. Ct. 1160 (1990), found that because the arrest before it was valid even under the Eleventh Circuit's Smith decision, it was unnecessary to "decide the question whether, if there is adequate reason for a stop based on a traffic violation, it is necessary that it also be shown that this was in fact the reason for the stop." In United States v. Crotinger, 928 F.2d 203, 206 (6th Cir. 1991), the court believed that Pino had found the Smith analysis "useful," but it had no

The conflict in approach between the decision in this case and in Guzman does not warrant this Court's review. First, petitioner would not prevail under the test in Guzman even if it were applied in this case. The New Mexico officers observed petitioner driving with a broken tail light, in violation of state law.[5] Because unmarked patrol cars are discouraged from stopping vehicles, the officers flagged down a state trooper who was conducting radar detection and requested him to initiate the stop. 6/21/90 Tr. 50-51, 58, 61, 64. Petitioner made no showing that the state trooper's making of a routine traffic stop departed from any applicable law enforcement policies, and it strains a common-sense approach to police practice to suggest that a reasonable state trooper would have ignored petitioner's broken tail light under the circumstances. Under Guzman, a defendant must show that his stop was out of character with "general police practice" to establish a pretext claim. 864 F.2d at 1518. Petitioner's "conclusory allegations" in support of his motion to

occasion to resolve the question left open in Pino because the arrest in Crotinger was supported by probable cause and there was no evidence that the police had an ulterior motive.

[5] As the court of appeals pointed out (Pet. App. A7), petitioner did not challenge either the factual or legal basis for the traffic stop in this case. Petitioner now asserts (Pet. 11) that "there was no evidence that New Mexico law allows highway stops for broken tail lights." But Officer James Torres, a ten-year veteran of the Albuquerque police department, testified that it is a violation of state law to drive a car with defective equipment, such as a broken tail light. 6/21/90 Tr. 42, 64. Further, there is no question that New Mexico law prohibits driving with defective tail lights. 11 N.M. Stat. Ann. §§ 66-3-801, 66-3-805 (Michie 1990) (making it a misdemeanor to drive a car on a highway without two tail lamps).

suppress, Pet. App. A7, did not include a proffer of evidence of "general police practice," and he therefore cannot prevail under Guzman.[6]

Second, wholly apart from petitioner's broken tail light, the stop in this case is justified under Terry v. Ohio, 392 U.S. 1 (1968). Petitioner visited the house of a well-known narcotics dealer, which was under surveillance by Albuquerque police officers. Officer Torres testified that while petitioner was there, the officers "saw what we believed was a transaction between [petitioner] and one of the occupants of the residence." 6/21/90 Tr. 63. The officers chose to follow petitioner as a result of that observation. Id. at 43. Officer Torres also testified that he believed he had probable cause to arrest petitioner at that time, but refrained from doing so because he thought that petitioner was headed to a "stash" location. Id. at 59. In light of those facts, this case does not present a situation in which a "pretext" traffic violation provides the only legal justification for a stop of petitioner. Rather, the officers had at least reasonable suspicion that petitioner had committed a narcotics offense, and it would have been perfectly appropriate for them to conduct a brief stop of petitioner to investigate their suspicions of his drug-related activity.

[6] Petitioner's claim was also properly rejected by the district court because it was not timely presented. See note 2, supra. Although the court of appeals did not reach that issue, the facts it recited make clear that petitioner had an ample basis for raising any pretext claim well before trial, and the district court did not abuse its discretion by failing to entertain that claim when it was raised after the jury had been selected.

Accordingly, even if the broken tail light justification were regarded as pretextual, the stop of petitioner's truck did not violate his Fourth Amendment rights.

Third, the Tenth Circuit's application of Guzman indicates that it is an extremely narrow rule; to our knowledge, no pretext claim asserted under Guzman has succeeded. See, e.g., United States v. Neu, 879 F.2d 805, 808 (10th Cir. 1989) (rejecting pretext claim where a reasonable officer would have made a traffic stop after the defendant abruptly slowed down while being followed); United States v. Erwin, 875 F.2d 268, 272 (10th Cir. 1989) ("a reasonable New Mexico patrol officer routinely would have stopped a vehicle traveling twelve miles over the speed limit even in the absence of the alleged illicit motive"); United States v. Rivera, 867 F.2d 1261, 1263-1264 (10th Cir. 1989) (rejecting claim that traffic stop leading to drug seizure was pretextual because state police had "working arrangements" with federal narcotics agents and had previously made similar stops and seizures). In light of the narrowness with which Guzman has been applied, and the fact that no other circuit has extended it to an arrest based on probable cause, review is not warranted to resolve the tension between Guzman and the rule applied in other circuits.

Nor do the state cases cited by petitioner (Pet. 15-16) suggest the existence of a more widespread conflict that would justify this Court's intervention. Most of the state courts that have addressed the issue agree with the approach adopted by the

court of appeals in this case.[7] Although a handful of state cases have applied a form of pretext analysis, those cases involved distinguishable facts, and none of the state cases petitioner cites creates a square conflict with the decision in this case.[8] Even if there is some disagreement in the state courts over the appropriate role, if any, of the notion of a pretextual arrest, that disagreement does not require this Court's review of petitioner's claim.

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[7] See Pet. 15; see also State v. Garcia, 794 S.W.2d 472, 477-478 (Tex. Crim. App. 1990); People v. Sorrells, 209 Ill. App. 3d, 568 N.E.2d 497 (4th Dist. 1991); State v. Olaiz, 100 Or. App. 380, 786 P.2d 734 (1990); Commonwealth v. Jones, 578 A.2d 527 (Pa. Super. 1990); Bosworth v. Commonwealth, 375 S.E.2d 756 (Va. App. 1989); State v. Mann, 103 N.M. 660, 712 P.2d 6 (Ct. App. 1985).

[8] In Hines v. State, 289 Ark. 50, 55-56, 709 S.W.2d 65, 68 (1986), the court found no pretext violation because the arrest for criminal mischief would have occurred even without the officer's suspicions regarding a recent murder. In Brown v. State, 738 P.2d 1092, 1095 (Wyo. 1987), the court found that an arrest of the defendant in her home on a two-year-old traffic warrant, together with a subsequent protective sweep, was a pretext for a narcotics investigation. Although relying principally on the pretext argument, the court also noted that the State "did not even establish the validity of the arrest," and "[n]o warrant appears in the record." Id. at 1096. In State v. Blair, 691 S.W.2d 259 (Mo. 1985), cert. dismissed, 480 U.S. 689 (1987), the defendant was ostensibly arrested on a traffic warrant but was immediately held in custody and booked on homicide charges. The pretext rationale was only an alternative ground for decision, and the court distinguished the case before it from a case in which the defendant commits a traffic offense in the presence of police officers, where any citizen would be stopped in ordinary police routine. Id. at 263. None of those cases, if applied to the facts of this case, would require the suppression of the evidence obtained as a result of the stop of petitioner's truck by a New Mexico trooper for an observed broken tail light.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

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